SUPREME COURT, U. S.
AUG

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 560

CITY OF CHATTANOOGA, TENNESSEE, FELIX MILLER, JR., DONALD W. HAYDEN, E. R. PICKETT AND FRED ROTHBERGER, JR.,
Petitioners,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 21, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals appears at *Appendix A, infra* pp. A1-A4, and is as yet unreported. The opinion of the United States District Court for the Eastern District of Tennessee, Southern Division, which was affirmed by said Court of Appeals, appears at *Appendix B, infra* pp. A4-A28, and is reported at 298 F. Supp. 1 (D.C.E.D. Tenn. 1970). The memorandum opinion of said District Court overruling petitioners' motion for a new trial appears at *Appendix B, infra* pp. A28-A32, and is unreported.

JURISDICTION

The Judgment of the Court of Appeals was filed on May 21, 1970. The Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the due process clause of the Fifth Amendment to the Federal Constitution, and the equivalent clause in Article I, Section 8 of the Tennessee Constitution, were violated by the refusal of the trial judge to reopen the proof in the light of newly discovered evidence, and permit Petitioners to examine Respondent relative to the existence of records in its possession of fundamental importance to the issue of whether or not the historic Civil War engine "General" had become the subject of a charitable trust, established by Respondent's predecessor in 1901 for the benefit of the City of Chattanooga and its citizens.

2. Whether Respondent's predecessor had, as a matter of Tennessee law, established a charitable trust with respect to the "General" requiring that it be kept in Chattanooga as a "monument to the valor of the past."

3. Whether the lower courts erred as to controlling principles of Tennessee law in holding that under the decision of the Tennessee Supreme Court in *Southwestern Presbyterian University* v. *Clarksville*, 149 Tenn. 256, 259 S. W. 550 (1923), a trustee not incorporated under Tennessee's charitable corporation laws, and not possessed of any power to sell, remove or transfer, may transfer trust property to another state without prior court approval.

4. Whether a railroad moving in interstate commerce shall be required to honor its representations in its advertising literature, prepared to induce the public to patronize its line, stating that the "General" would remain in Chattanooga permanently as a monument to American valor.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall . . . be deprived of . . . property, without due process of law . . ."

Article I, Section 8, Tennessee State Constitution:

> "That no man shall be . . . deprived of his . . . property, but by the . . . law of the land". (Volume I, *Tennessee Code Annotated*, page 226).

STATEMENT OF THE CASE

Petitioners, City of Chattanooga and the individual petitioners acting on behalf of the citizens of the city as a class, will be hereinafter referred to collectively as "Chattanooga". Respondent will be referred to as the "Railroad". The Nashville, Chattanooga & St. Louis Railway, which merged into the Railroad in 1957 (R 31a, A14, R 132a), will hereinafter be referred to as the "N C & St. L".

For many years the historic locomotive "General" was located in the City of Chattanooga. The Railroad seeks to move same to Georgia for location at Kennesaw in that State. Chattanooga seeks to prevent this move and to obtain a protective ruling which would assure the continued location of the "General" as before.

On September 11, 1967, the "General" was attached in a Tennessee State Court proceeding (A5) and the Railroad, which was within the jurisdiction of the court, was personally served with process (R 36a, R 43a). The case was removed to the Federal District Court at Chattanooga based upon diversity of citizenship (A5). After certain discovery, the case was submitted to the Court on motions for summary judgment (R 75a-81a; R 81a-82a).

District Judge Wilson filed an opinion adverse to Chattanooga on January 4, 1969 and a judgment was entered pursuant thereto on January 22, 1969 (A4-A28).

At the time said judgment was entered the only available information as to when the "General" had first been placed on "permanent" display in Chattanooga was that contained in representations in the Railroad's own literature, namely that this had occurred in the year 1891 (R 40a, A15, R 110a, R 127a). Despite due diligence, including a thorough search of the available library sources, neither Chattanooga nor the Railroad had been able to unearth any specific reference as to the circumstances surrounding the location of the "General" in Chattanooga and particularly as to the N C & St. L's full intent at the time (R 109a-112a). After a further tedious and detailed search involving the screening of over a decade of newspaper microfilm records, Chattanooga discovered, subsequent to the filing of Judge Wilson's original opinion, certain newspaper accounts indicating that contrary to the Railroad's representations and what had been under-

stood by all concerned at the hearing, the "General" was first placed on "permanent" display in Chattanooga in May of 1901 (R 114a-116a).

Thus, the *Chattanooga News* of May 17, 1901, announced the arrival of the "General" in Chattanooga the previous evening, stating that it "now reposes in state in this city" and that the "war time engine becomes a monument" and also stated "it will remain in the yard here as a permanent monument to American valor, a welcome sight to all visitors" (R 134a-135a).

The *Chattanooga Times*, in its edition of May 27, 1901, stated that the "General" "will be kept here permanently" (R 115a). *The Chattanooga Press* on May 31, 1901, stated that "the General . . . has at last been 'captured' by Chattanooga and hereafter will be a part of the war relics of this city. . . . Hereafter visitors to this city will enjoy the sight of this relic of the Civil War" (R 116a).

Further indication of the public's understanding of the situation is to be found in the *Chattanooga News* of May 21, 1913, which said (R 116a-117a):

> ". . . It was at the instance of the late Maj. T. W. Thomas, President of the Nashville, Chattanooga and St. Louis Railroad, that the historic engine was finally honorably discharged from service and sent to spend the remainder of its days in Chattanooga. It is venerated by the employees of the railroad and kept always clean and shiny."

Additional information discovered after the hearing indicated that the Railroad had a substantial public relations problem in Chattanooga at the time in 1901, which it was attempting to alleviate through the foregoing gesture (R 118a-120a).

Based on said newly discovered evidence establishing for the first time a concrete reference point for an examination of the Railroad's records, Chattanooga sought leave to have the proof reopened so that it might take certain discovery of the Railroad (R 108a). Certain obscure pamphlets published by the N C & St. L in 1941 were also discovered subsequent to the original hearing, indicating the possession of elaborate corporate records relative to the official acts of the N C & St. L (R 122a-123a). The Railroad denied the existence of any further pertinent information in its files by affidavit of one of its counsel (R 131a-133a). This affidavit was based in part on hearsay (R 132a) and merely claimed the destruction of records relating to "rolling stock" which had been maintained by the N C & St. L prior to the 1957 merger. In overruling Chattanooga's motion for a new trial the District Judge denied Chattanooga the right to take further discovery from the Railroad testing its claim that it had no other pertinent records (A31).

The pivotal issue involved was the full intent of the N C & St. L at the time it took official corporate action to cause the location of the "General" in Chattanooga in 1901. This knowledge was peculiarly within the control of the Railroad as successor by merger to the N C & St. L, but it produced no evidence whatsoever bearing upon this question. Despite lack of knowledge of these essential circumstances, present management of the Railroad does not hesitate to claim a full right to dispose of the "General" as it sees fit (R 36a-37a, R 40a-41a, R 42a).

In addition to said newspaper accounts with their obvious inferences as to the intent of the N C & St. L as it was understood at the time, other secondary facts clearly substantiate that it was the intent of the N C & St. L to establish a charitable trust with respect to the "General",

requiring its permanent location in Chattanooga as a monument to the heroes of the Civil War. The N C & St. L's own advertising literature, designed to induce the public to patronize its lines instead of its competitors (R 123a-124a), made repeated references to the "General" as being on "permanent exhibition" in Chattanooga (R 16a, R 18a, R 46a, R 47a, R 49a, R 52a); referred to Chattanooga as "the permanent resting place" of the "General" where it "shall stand as a monument to American valor and can be seen at anytime" (R 15a, R 17a, R 45a, R 47a); and used such other phrases as "remain permanently as a monument to American valor" (R 15a, R 53a); "permanent monument" (R 16a, R 46a, R 52a, R 55a); and "lasting monument" (R 18a, R 47a).

The N C & St. L faithfully maintained the "General" after 1901 at its expense upon its private property under its exclusive custody and control (R 33a, R 40a, R 41a, R 76a, R 78a-80a) and the trial court so found (A17, A22). After the merger in 1957, the Railroad for a time also continued to so honor the trust. When the State of Georgia sought the removal of the "General" to that State in 1959, the Railroad refused, announcing that the length of time that the "General" had been in Chattanooga justified Chattanooga's request that it stay there, thereby honoring a resolution of the Tennessee Legislature in 1959 to the same effect (R 54a-55a, R 66a-70a, A17). The District Judge specifically found that the Railroad and its predecessor had represented to the City of Chattanooga that the "General" would remain there, but felt that there was no legal remedy available for the breach of these representations (A27).

The circumstances which caused the Railroad to desire to shift the "General" to a new location away from the City of Chattanooga arose in 1967 when the Railroad

and the Southern Railway were competing before the Georgia Legislature for the new lease of the state owned line between Atlanta and Chattanooga (R. 126a, R. 128a-129a). At that time the Railroad found it expedient to offer to "return" the "General" to the State of Georgia, which offer was accepted by the Georgia General Assembly on April 5, 1967 (R 128a-129a, R 25a). Although the Georgia Attorney General ruled in 1959 that the Railroad had full title to the "General" (R 21a-22a, R 69a-70a), the president of the Railroad told the Georgia Legislature in 1967 "that the L & N recognized that the locomotive belonged to the State of Georgia" (R. 128a-129a). The District Judge found that the Railroad and its predecessor acquired title to the "General" effective as of the 1890 lease (A14).

The Court of Appeals affirmed the trial court's action in all respects (Appendix A, pp. A1-A4).

REASONS FOR GRANTING THE WRIT

1. The Historical Importance of the "General" Merits the Exercise by This Court of Its Discretion to Review This Case.

The "Great Locomotive Chase" in which the "General" participated has been referred to as "the most dashing, most gallant, desperate and thrilling incident of the Civil War" (R 130a). The District Judge reviewed the "General's" history in detail in his original opinion (A7-A13). The first recipients of the Congressional Medal of Honor were the Union soldiers who participated in Andrew's Raid, using the "General" as their iron horse (R 8a, A13).

Eight of the raiders were executed by the Confederate forces after their capture and these eight are all buried

in a common plot in the National Cemetery at Chattanooga, Tennessee, including Andrews himself, the civilian leader of the raiders. The State of Ohio, from which they all came, has erected a famous monument at their gravesite bearing a detailed replica of the engine "General" upon same, which was dedicated on May 30, 1891 (R 8a-9a, A12).

It would accordingly appear only fitting that the final decision determining the future of this historic relic from our nation's past be made in this Court. It has been held that the purpose of 28 USC, section 1254 (1), the jurisdictional statute here involved, and the similar statute which preceded it, was to bring up cases of importance which it is in the public interest to have decided by this court of last resort. *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 82 L. ed. 1290, 58 S. Ct. 860.

2. The Refusal of the Lower Courts to Permit the Reopening of the Case in the Light of Newly Discovered Evidence Timely Offered, for the Taking of Additional Testimony and Discovery, Denied Petitioners the "Full Hearing" Guaranteed As a Matter of Due Process by the Above Quoted Sections of the Federal and Tennessee Constitutions.

The phrase "the law of the land" used in the above quoted section of the Tennessee State Constitution and the phrase "due process of law" used in the Fifth Amendment of the Federal Constitution are synonymous phrases meaning one and the same thing and that which is violative of one is violative of the other. *Illinois Central Ry. Co.* v. *Crider*, (1892) 91 Tenn. 489, 19 S. W. 618. Tennessee recognizes that this Court is the final arbiter of questions involving due process contained in both the State and Federal Constitutions, *Paine* v. *Fox*, (1938) 172 Tenn. 290, 112 S. W. 2d 1.

The aim of every judicial proceeding is to achieve justice. To this end, Rule 59a of the Federal Rules of Civil Procedure permits the opening of a judgment previously entered so as to permit the taking of additional testimony and discovery in the light of newly discovered evidence, and thereafter allows the entry of a new and revised judgment accordingly.

In this case the material facts are buried in antiquity. Those which have been unearthed to date have resulted essentially from an elaborate screening of available library facilities by Chattanooga (R 109a-131a, R 133a-135a). The Railroad has thus far avoided the same painstaking search through its own records, which should be highly material, through its uncross-examined statement that it has made a search and found nothing of importance (R 132a).

No one has questioned that the additional facts discovered by Chattanooga subsequent to the original hearing met all the tests of newly discovered evidence. The District Judge so accepted same (A29), but held that that which had been found would not alter the court's original opinion (A29-A30). Chattanooga recognizes that its desired goal of locating specific evidence of the N C & St. L's official act in 1901 in placing the "General" in Chattanooga has yet to be attained, with such light as such a finding should have upon the issue of the donative intent of the Railroad's predecessor. So far as is known, the Railroad is the only possible source of this critical information. To what extent it has been willing to fairly and impartially comb tediously through such ancient records as are still in its possession or control is yet to be ascertained.

The secondary evidence in the record is consistent only with the establishment of a charitable trust in the

"General", with the predecessor of the Railroad acting as the trustee for the benefit of Chattanooga. To close these proceedings permanently in this state of the record denies Chattanooga the full hearing contemplated under the law and accordingly denies it due process of law, 16A *C.J.S.*, "Constitutional Law", Section 622. The denial of the right to cross-examine witnesses is a fundamental denial of due process of law, *Alford* v. *United States*, 282 U. S. 687, 75 L. ed. 624, 51 S. Ct. 218; *Sardo* v. *McGrath*, 96 F. 2d 20, 90 U. S. App. D. C. 195; *Ex parte Jackson*, 263 F. 110, also 267 F. 1022. A litigant must be given his "day in court", meaning a full hearing. *Tennessee Cent. R. Co.* v. *Pharr*, 183 Tenn. 658, 194 S. W. 2d 486.

Procedural due process requires confrontation and cross-examination of adverse witnesses. *Willner* v. *Committee*, 373 U. S. 96, 10 L. ed. 2d 224, 83 S. Ct. 1175. The right under the due process clause to a full hearing includes the right to be allowed to introduce evidence if timely procedures are followed. *Baltimore & O. R. Co.* v. *U. S.*, 298 U. S. 349, 80 L. ed. 1209, 56 S. Ct. 797. There is no full hearing in the constitutional sense where the evidentiary facts upon which a conclusion is based have not been offered or considered and the complaining party has not been given an opportunity to test, explain or refute. *ICC* v. *Louisville & N. R. Co.*, 227 U. S. 88, 57 L. ed. 431, 33 S. Ct. 185.

A decision by a judge prior to a hearing of all the evidence amounts to deprivation of property without due process of law. *Rosenberg* v. *Baum*, CCA Kan. 1946, 153 F. 2d 10.

Chattanooga should be permitted in any event to take the Railroad's discovery as to the existence of information in its records bearing upon the location of the "General"

in Chattanooga in 1901—a step not previously taken by Chattanooga for proper reasons not involving a lack of diligence (R 112a).

3. The Railroad's Admissions Already in the Record Establish That a Trust Was Created under Tennessee Law As Claimed.

The opinions of the lower courts conflict sharply with the applicable law of trusts in Tennessee.

The District Judge did correctly find that a charitable trust could have been created with respect to the "General" under Tennessee law which he cited (A23). This subject was briefed extensively at pages 18-24 of Chattanooga's brief in the Court of Appeals, which brief has been certified to this court. It was the obligation of the lower Federal Court to correctly apply Tennessee law to the fact situation presented.

The Tennessee Supreme Court in *Pope* v. *Alexander*, 194 Tenn. 146, 250 S. W. 2d 51 (1952) held that any effort to tie up property in perpetuity for private memorial purposes is not for a charitable purpose and hence, is void as a violation of the rule against perpetuities. Even if the writings in the Railroad literature in question were susceptible to more than one construction, a court will favor that interpretation of same which will make the trust valid and effective. *Mastin* v. *First National Bank of Mobile*, 177 So. 2d 808 (Ala. Sup. Ct., 1965); *Bell* v. *Shannon*, 212 Tenn. 28, 367 S. W. 2d 761 (1963); *Moore* v. *Neely*, 212 Tenn. 496, 370 S. W. 2d 537 (1963); *Hardin* v. *Independent Order, etc.*, 51 Tenn. App. 586, 370 S. W. 2d 844 (1963).

Thus, the assorted statements by the Railroad's predecessor to the effect that it held the "General" permanently in Chattanooga as a monument to American valor (pp.

6-7 above), should be construed to indicate an intent to create a charitable trust, and thereby give validity to said express purposes. The trial judge's finding that a monument for private purposes had been created (A24) would immediately cause a violation of the rule against perpetuities.

Oddly enough, the Railroad itself, even after the filing of the subject case, apparently did not question the trust status of the "General" which had come into its possession after the merger. It merely insisted upon a right to remove.

Thus, the president of the Railroad stated in connection with the litigation that the Railroad had a firm policy that the "General" would participate only in public interest type events; that it was concerned as to the "General's" "future protection as a heritage of history"; and he stressed the "desirability of protecting and preserving the 'General' for future generations." (R 128a-129a). These words are totally inconsistent with a change in status of the "General" from private property to trust property through the contemplated transfer to the State of Georgia by the Railroad.

The Railroad's own language in its representations to the public should be given a reasonable construction in accordance with its plain English, and when so treated can only be construed as evidencing the creation of a charitable trust as claimed.

4. In Holding That the Railroad As a Trustee Had the Power to Transfer the "General" to the State of Georgia, the Lower Courts Decided an Important Question of Tennessee Law in Sharp Conflict with the Applicable Decision of the Tennessee Supreme Court.

In construing the meaning of the word "permanently" under Tennessee law, the trial judge placed critical im-

portance upon the decision of the Tennessee Supreme Court in *Southwestern Presbyterian University* v. *Clarksville*, 149 Tenn. 256, 259 S. W. 550 (1923) (A25-A26). He held that even if a charitable trust did exist with respect to the "General", nonetheless under the *Clarksville* case, "the defendant would have the right to relocate the 'General'" (A26).

The Tennessee Supreme Court in that case was merely defining what it meant by *its* use of the phrase "permanently located" in *its* 1904 decree in a related case (149 Tenn. at 264, 266-267). In the *Clarksville* case the court described three different *statutory* methods whereby the Tennessee Legislature had provided that the directors of a charitable corporation could relocate its property (149 Tenn. at 272). The right to relocate specified in the *Clarksville* decision is limited to the assets of charitable corporations and has no application whatsoever to trustees generally. As to ordinary trusts the right to relocate trust *res* does not exist under Tennessee law without prior court approval, in the absence of a grant of such power to the trustee under the trust instrument. Any attempt to so transfer by a trustee will be set aside at the request of the beneficiaries. *Munsey* v. *Russell Brothers*, 31 Tenn. App. 187, 213 S. W. 2d 286 (1948); *Ward* v. *Crisp*, 189 Tenn. 513, 226 S. W. 2d 273 (1949). See also 90 C.J.S., "Trusts", Section 287 (a).

In the *Clarksville* decision the Tennessee Supreme Court expressly approved (but sought to distinguish) *Hascall* v. *Madison University*, 8 Barb. (N. Y.) 175 (149 Tenn. at 273-274). The *Hascall* decision held that the reiterated use of the word "permanent" in the documents being construed, and particularly in connection with the phrase "permanently located", "must be construed as limiting the power of removal". This is precisely the situation

in the many versions of the Railroad's own literature using such words to describe the status of the "General" in Chattanooga to the public. See pp. 6-7 above; see also Chattanooga's brief in the Court of Appeals, pages 16-18.

Under fundamental trust law a trustee removing trust property to enhance the trustee's private commercial purposes (with no benefit to the trust whatsoever), violated the rules against self-dealing and requiring undivided loyalty on the part of the trustee, *Cowan* v. *Hamilton National Bank*, 177 Tenn. 94, 146 S. W. 2d 359 at 367 (1941); *Thruston* v. *Nashville, etc. Trust Co.*, 32 F. Supp. 929.

It was the N C & St. L which placed the "General" in Chattanooga and not the Railroad. The Railroad knows no more of the intent of the N C & St. L in 1901 than does Chattanooga. In addition to the N C & St. L's words which have been discovered, which are only consistent with a charitable intent under Tennessee law, the fact that the N C & St. L kept the "General" in Chattanooga for 56 continuous years before the merger shows its construction of its own declarations.

In the light of the prima facie case established by the secondary evidence offered as to the intent of the N C & St. L in 1901, the failure of the Railroad to come forward with evidence which was peculiarly in its possession creates a presumption in favor of Chattanooga. *Burke* v. *L. & N. Ry. Co.*, 54 Tenn. 451 (1872); 29 *Am. Jur. 2d*, "Evidence", Section 179. The failure of the Railroad to explain away through the "best evidence" the otherwise proper inferences to be drawn from the advertising literature as to the intent of the N C & St. L in 1901, is a failure of proof, the consequences of which must fall upon the Railroad and not Chattanooga.

The fundamental misconstruction of the Tennessee law of trusts by the lower courts, centering around an

erroneous construction of the *Clarksville* case, merits corrective action by this court.

5. A Railroad Making Explicit Representations to the Public to Induce Patronage Should Be Held to Such Representations.

A serious question of business ethics involving the transportation industry is here involved. The District Judge felt that the law afforded no relief to the public when a railroad made false advertising representations to the public (A27).

Chattanooga relies upon the proposition that when advertisements contain a clear representation that the advertising party will do certain things, and the public, as contemplated by the advertising party, responds to said advertisement and patronizes the advertising party with business, a binding contract results which will prevent the advertising party from failing to honor the representations made as his part of the bargain. *Lefkowitz* v. *Great Minneapolis Surplus Store*, 86 N. W. 2d 689 (Minn. Sup. Ct., 1957). In that case it was stated (page 691) that:

> "The test of whether a binding obligation may originate in advertisements addressed to the general public is 'whether the facts show that some performance was promised in positive terms in return for something requested.' 1 *Williston*, Contracts (Rev. ed.) Section 27."

The citizens of Chattanooga parted with money which the Railroad received instead of its competitors. In return said citizens or their freight were transported and the Railroad promised in positive terms in its advertising literature to keep the "General" in Chattanooga (pages 6-7 above; R 123a-124a). Thus, the necessary mutuality existed, and the Railroad would be unjustly enriched if it were permitted to avoid a portion of its part of the bargain.

CONCLUSION

While the Court of Appeals inferred that there was a lack of precedent in favor of the points raised by Chattanooga, but did not choose to discuss the abundance of authority cited to it, it nonetheless urged Chattanooga to "go the last mile and knock at the portals of the Supreme Court" (Opinion of Court of Appeals, page A2). Chattanooga submits that apart from the historical importance of the "General", this case merits the attention of this court because a serious question as to the meaning of a "full hearing" under the due process clause has been presented. Further, a sharp conflict with controlling Tennessee and other precedent has been established.

Accordingly, Chattanooga prays that for the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 20, 1970.

APPENDIX A

No. 19721

United States Court of Appeals

FOR THE SIXTH CIRCUIT

CITY OF CHATTANOOGA, TENNESSEE, FELIX MILLER, JR., DONALD W. HAYDEN, E. R. PICKETT, AND FRED ROTHBERGER, JR.,
Plaintiffs-Appellants,
v.
LOUISVILLE & NASHVILLE RAILROAD CO.,
Defendant-Appellee.

APPEAL from the U.S. District Court for the Eastern District of Tennessee.

Decided and Filed May 21, 1970.

Before WEICK and COMBS, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

PER CURIAM. The issue at trial of this case was whether appellant City of Chattanooga, Tennessee, has the right to insist that a romantic relic of the Civil War—the famous steam locomotive, the General—permanently remain on display in that city. Its present and apparent owner, appellee Louisville & Nashville Railroad Company, proposes to deliver it to the town of Kenesaw, Georgia, there to continue to commemorate what one Civil War historian described as "probably the most dashing, most gallant, desperate and thrilling incident of the Civil War."

District Judge Frank W. Wilson gave judgment for the L & N, dismissing Chattanooga's complaint.

We affirm.

The General had been on display at the Union Station in Chattanooga, Tennessee, from about 1901 until it was taken, shortly before this litigation, into the State of Kentucky. On September 11, 1967, the locomotive was being transported through Chattanooga, Tennessee, on its way to Kenesaw, Georgia. Thereupon, and with some of the daring that characterized its memorable journey in 1862, a group of intrepid yeomen of Chattanooga captured the General by service of a writ of attachment—"executed by causing the main north-south freight line of the railroad to be blocked with automobiles placed across the tracks, thereby stopping the train." *State of Georgia* v. *City of Chattanooga, Tennessee*, 406 F(2) 830, 832 (6th Cir. 1969). The procedural jousting which characterized the beginnings of this litigation, and in which we had a part with our above opinion,[1] having subsided, the case was submitted to the District Court for decision on the merits.

Our affirmance of Judge Wilson's judgment may be the last chapter in the history of the General. The issue was, and is, ripe for final decision. We doubt, however, that Chattanooga, its involved citizens and their counsel, will stop at this level. We applaud and admire the zeal, the creativeness and the tirelessness with which they have continued to press on with their claims. Surely they will go the last mile and knock at the portals of the Supreme Court. Innovators have not always been turned away merely because they came without precedential support.

1. We held that the attachment was an unwarranted intrusion and burden upon interstate commerce.

From its arrival in Chattanooga in 1901, the L & N Railroad and its predecessors have had possession of the General. There was evidence from which it could be found that the railroad's ownership of the locomotive had come to it from its original owners through a valid chain of title. The representatives of Chattanooga, however, insist that without reference to technicalities and niceties of title, the General should remain in perpetuity on display as an historical monument within the geographical limits of Chattanooga.[2] They advance theories of charitable trust, dedication, estoppel, prescriptive right, implied contract and others to support their claim to relief. District Judge Frank W. Wilson's opinion in this case is reported as *City of Chattanooga v. Louisville & Nashville Railroad Co.*, 298 F. Supp. 1 (D.C. E.D. Tenn. 1970). Aside from our general agreement with the opinion, we very much like its prefatory remarks, and we quote this much of them:

> "In this lawsuit the pursuit of the 'General' continues. While the capture of the now ancient and historic steam locomotive known as the 'General' remains the object of the pursuers in this lawsuit, unlike on that fateful day of April 12, 1862, life and death does not hang in the balance. Rather here the pursuers and the pursued vie with each other as to the more appropriate manner to preserve and do honor to the memory of the men and the traditions which are bound up in the story of the 'General.'
>
> "In an age when scarcely a tradition heretofore honored by men is not under attack and when there seems to be scarcely any institution whose legitimacy

2. The General would be little seen if returned to its wonted stall in the Union Station at Chattanooga. That one time exciting part of America's then teeming railway system stands empty now —a sad reminder of the days when a proud Dixie Flyer and other great trains made stops there. Only the birds that twitter in the upper, and now rusted, supports of the silent train shed would see it.

is not suddenly subject to peremptory challenge, it is well that there should be those whose concern is to preserve the traditions that have stood the test of time and to defend the institutions that have made this a united nation of free men." 298 F. Supp. at 2.

The opinion sets out a history of the exciting events which brought fame to the General. It correctly discusses relevant law. Judge Wilson denied plaintiff's motion for new trial made upon the ground of newly discovered evidence. We are of the view that he acted discreetly in denying it.

The judgment of the District Court is affirmed.

APPENDIX B

Opinion

(Filed January 4, 1969)

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In an age when scarcely a tradition heretofore honored by men is not under attack and when there seems to be scarcely any institution whose legitimacy is not suddenly subject to peremptory challenge, it is well that there should be those whose concern is to preserve the traditions that have stood the test of time and to defend the institutions that have made this a united nation of free men.

This lawsuit began with the issuance in a state court of an original attachment for the Civil War steam locomotive known as the "General". At the time the attachment was issued on September 11, 1967, the locomotive was being transported through Chattanooga, Tennessee, by the defendant, The Louisville and Nashville Railroad Company, and was destined to be delivered to the Town of Kennesaw, Georgia, in accordance with an understanding between The Louisville and Nashville Railroad Company and the State of Georgia. A preliminary injunction was likewise issued restraining the defendant from removing the "General" from the jurisdiction of the Court pending the action of the Court. Shortly thereafter the individual plaintiffs to this lawsuit were permitted by the state court to intervene as interested citizens in support of the original complaint of the City of Chattanooga. In due time the lawsuit was removed to this Court.

The State of Georgia, desiring to oppose the effort of the City of Chattanooga to obtain the "General" as a historical monument and seeking rather to obtain the locomotive as a historical monument for the Town of Kennesaw, Georgia, but not wishing to intervene in the present case for fear that doing so might destroy federal diversity jurisdiction, filed a related lawsuit in this court entitled "*State of Georgia* v. *City of Chattanooga, Tennessee*," Civil Action No. 5092. On motion this lawsuit was dismissed for lack of federal question jurisdiction, and the case is now on appeal upon this jurisdictional issue. However, the State of Georgia was permitted to appear in the present lawsuit as amicus curiae and in such capacity has supported the position and contentions of the defendant, The Louisville and Nashville Railroad Company, in its efforts to secure dismissal of the attachment and injunction.

The single issue presented in this lawsuit is whether the City of Chattanooga and the public for which it acts have acquired an interest in the "General" recognizable either in law or in equity such as would entitle it to an appropriate judgment requiring that the "General" be maintained as a historical monument in Chattanooga, Tennessee, in perpetuity.

The case has now been submitted unto the Court upon cross motions for summary judgment. The record upon which these motions must be decided consists of the admissions and uncontested allegations in the pleadings, various affidavits, the plaintiffs' joint answers to interrogatories, and a series of 14 documents, the authenticity of which has been stipulated, although their relevance is objected to. Upon oral argument of the cross motions for summary judgment, each party conceded that there was no genuine or material issue of fact in the case. The case must accordingly be decided upon the present record.

It is the contention of the plaintiffs in this case that the City of Chattanooga and the public which it represents have a paramount right to retain or recover possession of the locomotive, the "General", from the defendant, The Louisville and Nashville Railroad Company, upon one or more of the following legal theories: (1) that the defendant has heretofore made a permanent dedication of the "General" to the citizens of Chattanooga, such dedication being made in the nature of a charitable trust; (2) that the City of Chattanooga and its citizens have acquired a prescriptive interest in the "General" entitling them to retain the engine as a permanent historical monument; (3) that the defendant has impliedly contracted that the "General" will remain upon permanent public display in the City of Chattanooga; and (4) that under the law of estoppel the defendant should be denied the right to remove

the "General" from public display in the City of Chattanooga. Before considering any of these legal contentions, a statement of the undisputed facts in the record should be made. Preliminary thereto it should be noted that the jurisdictional facts are not in dispute. Both diversity of citizenship and jurisdictional amount are conceded.

THE WESTERN AND ATLANTIC RAILROAD AND THE ORIGIN OF THE GENERAL

On December 21, 1836, the State of Georgia created by legislative enactment the "Western and Atlantic Railroad of the State of Georgia." The Western and Atlantic Railroad was to be wholly owned by the State of Georgia. In accordance with this authority, the right-of-way was acquired and a railroad was constructed between Atlanta, Georgia, and Chattanooga, Tennessee. The portion of the right-of-way which extends from the Georgia-Tennessee State line to the Union Railway Terminal within the City of Chattanooga lies within the State of Tennessee and within the City of Chattanooga. Title to this land was duly acquired by the State of Georgia and its ownership remains in the State of Georgia to this day, as does the title to all of the properties belonging to the Western and Atlantic Railway, although as hereinafter noted the lease did provide a method for the lessee acquiring title to rolling stock. From its inception until 1870 the Western and Atlantic Railway was operated by the State of Georgia. Since 1870 the Western and Atlantic Railway has been under lease, the defendant being the present lessee.

The steam locomotive which is the subject of this lawsuit was built for the Western and Atlantic Railway in 1855 at Paterson, New Jersey, by the Rogers Locomotive Works. Upon its acquisition, the Western and Atlantic Railway gave the locomotive the name "General" and

placed it in service running principally between Atlanta and Chattanooga. Though the "General", with its wood burning boiler, its funnel smoke stack and its two-wheel drive, is now so small and quaint even for a steam locomotive, at the time the Civil War commenced in 1861 it was a rather modern and most serviceable locomotive. However, it was not then otherwise noteworthy. Had it not been for the events of a fateful day in April of 1862, and the role it played on that date, the "General" would doubtless long since have disappeared, the victim of time and railroad progress. To understand the immortality of the "General" as well as to understand why it now finds itself the center of an interstate legal struggle, one must know the Civil War story of Andrews' Raid.

ANDREWS' RAID AND THE GENERAL

The story of Andrews' Raid, or "The Great Locomotive Chase," the name by which it is sometimes known, is one of the more dramatic—and tragic—stories to come out of a dramatic and tragic era in the history of this nation, the American Civil War. Although the record in this case does not reflect much of the story which entitles the "General" now to be considered as a historic relic of importance, the Court can take judicial notice of that story. The following is an abbreviated account of that story.

By April of 1862 the war had already lasted longer than anyone had originally thought likely or even possible. However, in February of that year Union forces, under the leadership of Grant, had achieved significant victories at Forts Henry and Donaldson, breaking the Confederate line in Kentucky and opening up Middle Tennessee to Union troops. By April of 1862 the Confederate forces were concentrated at Corinth, Mississippi, and both Grant and Buell were advancing with Union Armies toward that point.

General O. M. Mitchell had been left with one Union division to occupy Nashville and to advance the Union position in that area of Tennessee. General Mitchell determined to press on toward Chattanooga, occupying as many strategic points in that direction as he could before their defenses could be prepared.

By April 7, 1862, Mitchell had advanced with a detachment of his troops to Shelbyville, Tennessee. His plans were to seize Huntsville, Alabama, and then move rapidly by rail to capture Chattanooga. To further his plans General Mitchell determined to send a raiding party deep into enemy territory. Twenty-four soldiers, all volunteers from three Ohio regiments, were selected for the hazardous venture. They were placed under the leadership of James J. Andrews, a civilian, who had previously rendered services to the Union behind the Confederate lines in the Chattanooga and Atlanta areas. Their instructions were to secretly enter the enemy territory and by means of capturing a train to burn the bridges on the northern part of the railroad between Atlanta and Chattanooga, thus isolating Chattanooga from assistance from the South and East. Chattanooga at that time was ungarrisoned by Confederate troops. Andrews' party was to confirm the success of their raid by rejoining General Mitchell's forces west of Chattanooga as those forces moved upon Chattanooga along the railroad line from Huntsville. The raid and the rejoining with Mitchell's forces were to occur upon Friday, April 11, 1862.

Upon the appointed date, General Mitchell's forces seized Huntsville and a detachment of 2,000 men, under the personal command of Mitchell, swiftly advanced by rail to within 30 miles of Chattanooga. Then, receiving no word from Andrews' party as planned, Mitchell turned back at this point. Another year and a half was to pass and

three major battles with heavy losses were to be fought at Murfreesboro, Chickamauga and Chattanooga before that City was to be secured by the Union. Why had Andrews' raiders failed to keep their rendezvous with General Mitchell? The story is the story of the "Great Locomotive Chase".

Departing from Shelbyville in civilian dress upon the evening of April 7, 1862, Andrews' party broke into small detachments to work their way to Marietta, Georgia, where they were all to meet at an appointed hour and place on the evening of April 10. The raid was then to be conducted on April 11 in coordination with the movement of General Mitchell's forces upon Chattanooga. However, heavy rains and swollen streams delayed Andrews' progress and, thinking Mitchell's forces would surely be likewise delayed, Andrews took it upon himself to delay by one day the execution of the raiders' plans. The raid and the rejoining with Mitchell's forces were now rescheduled by Andrews to occur upon Saturday, April 12, rather than upon the originally agreed date of Friday, April 11. Friday was clear and trains ran upon schedule upon the Atlanta-Chattanooga line. Upon Saturday it rained throughout the day and nothing ran on schedule. These factors, along with others, sealed the doom of Andrews and his party's venture.

On the morning of April 12, 1862, 20 men, including Andrews, boarded the northbound train at Marietta, Georgia having purchased tickets for various destinations to avoid suspicion (five men failed to keep their rendezvous with Andrews in Marietta, although two of them were later captured and imprisoned with the rest). The locomotive pulling that train was the "General". Eight miles north of Marietta the train made a scheduled stop at Big Shanty—since renamed the Town of Kennesaw. When the crew and passengers departed from the train for break-

fast, as was the custom, Andrews and his party quickly uncoupled the engine and three boxcars from the rest of the train, seized the engine and headed north under full steam. The train's conductor, W. A. Fuller, witnessed the unscheduled departure of the train from his breakfast table. He and two other members of the train crew gave chase on foot.

For a time all went well with Andrews and his raiders. They made rapid progress, stopping from time to time to tear up track to avoid being overtaken and to cut telegraph wires to avoid any warning being sent ahead. To divert suspicion and obtain the right-of-way, Andrews boldly represented to station crews and other traffic that he met upon the rail that his train was specially commissioned and ordered to carry powder to General Beauregard at Corinth, Mississippi. At Kingston, Georgia, Andrews and his party were delayed more than an hour by unscheduled trains coming from the North. When he demanded to get through with his load of powder for General Beauregard, he was advised that Mitchell had captured Huntsville and was advancing on Chattanooga so that all trains were being moved out of Chattanooga to prevent their capture. Other unexpected delays were encountered along the line.

Meanwhile, Fuller and his party were continuing their relentless pursuit, first on foot for a distance of several miles, then by handcar, then with another locomotive, picking up reinforcements along the way.

As Andrews' party arrived in the vicinity of the bridges that were to be destroyed, north of Dalton, Georgia, the pursuit was so close as to prevent their accomplishing their purpose. Two of the boxcars had previously been dismantled for fuel or dropped piecemeal as obstructions upon the track. The last boxcar was fired and left upon a bridge

to burn, but before the bridge structure was itself extensively fired, Fuller's party drove into the fire car and pushed it from the bridge.

With throttles wide open, the race continued for mile after mile. The locomotive chase had now become a race for life for Andrews and his raiders. Finally, the General began running low on steam. With no wood for fuel and no time to stop for refueling, Andrews' party found their situation growing more desperate by the moment. Screaming up the track almost within gun shot behind them in the locomotive "Texas" was Conductor Fuller, with a detachment of Confederate troops he had picked up along the way. (The "Texas" is now enshrined as a historical monument in Grant Park, Atlanta, Georgia.) At a point some 18 miles short of Chattanooga, the General's last pound of steam was used. As the General coasted to a stop, Andrews ordered his men to jump and disburse themselves in the woods, each man endeavoring to save himself.

Within a week Andrews and all members of his party had been captured, including two who had failed to catch the morning train at Marietta. The captives were swiftly tried by military court. Andrews and seven of his cohorts were sentenced to death. On June 12, 1862, Andrews' sentence was carried out. A few days later the other seven men upon whom a death sentence had been pronounced were likewise executed. The bodies of all eight now lie in the National Cemetery at Chattanooga. In 1890, a monument was erected at their grave site by the State of Ohio. Mounted on top of the monument is a replica of the "General".

The sequel to the story of Andrews' Raiders, while less tragic, remains dramatic. The remaining raiders shortly made a bold escape from the Confederate prison at Atlanta.

Eight succeeded in eventually making their way back to the North. Six were recaptured, but in March of 1863 they, too, were repatriated in a prisoner exchange between the Union and the Confederacy. Meanwhile, on July 12, 1862, the United States Congress by resolution created the Congressional Medal of Honor. The first 19 presentations of the nation's highest award for valor in time of war went to the 19 Union soldiers who participated with James Andrews in the "Great Locomotive Chase".

Returning to the story of the "General", following its recapture it was returned to the service of the Confederacy on the Western and Atlantic line. Following the Battle of Atlanta, the "General" was once again captured by the Union forces on September 1, 1864, this time in a damaged condition as a result of the explosion of an ammunition train it was pulling. It was repaired by the Union forces and put in operation by the United States Military Railroad until September 25, 1865, when by order of the commanding Union general, it, along with other rolling stock and properties of the Western and Atlantic Railway were returned to the State of Georgia.

THE LEASING OF THE WESTERN AND ATLANTIC RAILWAY AND THE GENERAL

Following the Civil War the State of Georgia continued to operate the Western and Atlantic Railway until 1870. Then pursuant to an act authorizing the leasing of the line, the Western and Atlantic Railway was leased to private individuals for a period of 20 years, commencing on December 27, 1870. The "General" was among the rolling stock covered by the lease. At the expiration of the initial lease, a second lease was executed by the State of Georgia, this time the Western and Atlantic Railway being leased to the Nashville, Chattanooga & St. Louis

Railway, a Tennessee corporation, the lease commencing upon December 27, 1890. Once again the "General" was among the rolling stock that was leased. A third lease of the Western and Atlantic Railway was made by the State of Georgia, effective as of December 27, 1919. This time the lease was for a period of 50 years, to expire on December 27, 1969. The Nashville, Chattanooga & St. Louis Railway was again the lessee and the "General" was again among the rolling stock that was leased.

Under the 1890 lease some lack of clarity existed with respect to the obligation of the lessee to return or account for rolling stock at the end of the lease, but this matter was clarified in the 1919 lease by a provision to the effect that the lessee would account for all rolling stock received under the 1890 lease by payment of an agreed value of $361,041.00 or by substitution of replacement stock of an equal value, such accounting to be made at the expiration of the current lease in 1969. This right of the lessee to acquire title to the rolling sock and account for the value thereof was made retroactive to 1890, the date of the initial lease to the Nashville, Chattanooga & St. Louis Railway. In 1957 the Nashville, Chattanooga & St. Louis Railway merged into the defendant, The Louisville and Nashville Railroad Company, and the defendant herein became the lessee of the Western and Atlantic Railway under the provisions of the aforesaid lease. Thus no issue exists with respect to the Nashville, Chattanooga & St. Louis Railway, and its successor, The Louisville and Nashville Railroad, having acquired title to the "General" effective as of the 1890 lease.

THE STATUS OF THE GENERAL SINCE 1890

It is with respect to the use and handling of the "General" since 1891 by the Nashville, Chattanooga & St. Louis Railway, and its successor, The Louisville and Nashvi

Railroad, that the City of Chattanooga now predicates its claims in this lawsuit. These circumstances must accordingly be recounted.

The historical significance of the "General" was readily recognized by the Nashville, Chattanooga & St. Louis Railway upon its acquisition under the 1890 lease, with the result that in 1891 the famous Civil War engine was placed upon public display in Chattanooga, Tennessee. The "General" remained on public display in the Union Station in Chattanooga from 1891 until 1961 except for brief intervals. An appropriate plaque at the site recounted the story of the General's fame for the benefit of the viewing public. From time to time thereafter the Nashville, Chattanooga & St. Louis Railway, acting both in its own name and in the name Western and Atlantic Railway, published advertising and public service pamphlets and brochures in which it pictured the "General" and told the story of its Civil War fame. These pamphlets and brochures, commencing no later than 1909 and from time to time thereafter up until at least 1933, advised the public that the "General" was on display at the Union Station in Chattanooga. "It is there" states the 1909 pamphlet "to remain permanently as a monument to American valor and to be seen at any time by travelers passing through Chattanooga over this Railway". Similar language announcing the Union Station at Chattanooga as the General's "permanent resting place" and that it there "stands as a monument to American valor" was repeated from time to time over the years in publications issued by the Nashville, Chattanooga & St. Louis Railway. In 1933 the "General" was temporarily taken to Chicago by the Nashville, Chattanooga & St. Louis Railway, where it was put on display at the Chicago World's Fair of that year. The public viewing this display were advised that "the perm-

anent resting place of this famed relic of the Civil War is in the Union Station at Chattanooga, where it stands as a Memorial to American valor and has been seen by travelers passing through Chattanooga over the Nashville, Chattanooga & St. Louis Railway."

Recognition of the "General" as being a historical monument in its midst worthy of public attention, remembrance and acclaim was early given by the City of Chattanooga. The City adopted a likeness of the "General" upon its official seal and it so continues unto this day. The "General" was included in tourist publications as a major tourist attraction in the City.

When upon two previous occasions, once in 1939 and again in 1959, efforts were made by the State of Georgia to recover the "General" the attempts were met by spirited opposition on the part of the City of Chattanooga and its citizens. Upon each of these occasions many statements were made by public and private individuals in opposition to the move. It further appears that neither the Nashville, Chattanooga & St. Louis Railway in 1939 nor The Louisville and Nashville Railroad in 1959 would accede to any request on the part of the State of Georgia to move the "General" from its place of display in the Union Station at Chattanooga. However, in 1961 The Louisville and Nashville Railroad did remove the "General" from Chattanooga. Upon inquiry by officials of the City of Chattanooga, the defendant is reported to have advised on this occasion that the locomotive was being removed for repairs at the defendant's railroad shops in Louisville, Kentucky, and thereafter it would be displayed at various points about the nation in connection with the Civil War Centennial activities, but that when such centennial use was over the locomotive would be returned to Chattanooga. Except for a centennial observance of Andrews' Raid held

in Chattanooga upon April 14, 1962, however, the "General" was not again returned to Chattanooga for display. Rather, in 1967, in response to further efforts by the Georgia State Legislature to recover the "General", it was announced by The Louisville and Nashville Railroad that the Civil War engine, now fully restored to operating condition, would be delivered by that Railroad to the State of Georgia for permanent placement and display at Kennesaw, Georgia, the place of its capture by Andrews' Raiders in 1862. Delivery of the engine to Kennesaw was to be made by the defendant on or before September 14, 1967, for ceremonies scheduled on that date. The "General" was attached by the City of Chattanooga in the present lawsuit upon September 12, 1967, as it arrived in the City enroute to Georgia.

Before turning to a consideration of the legal issues raised by the present motions, one further factual matter should be noted. It appears undisputed that between 1891 and 1961, when the "General" was on display in Chattanooga, the engine was at all times located in the Union Station, property that was privately owned by the Nashville, Chattanooga & St. Louis Railway and its successor, The Louisville and Nashville Railroad. Although some claim was made in early pleadings in the case that the City of Chattanooga or its citizens had contributed in some manner to the upkeep and maintenance of the "General", it is now conceded by the plaintiffs that they have no knowledge of any such support or contribution to the maintenance or display of the "General". It rather appears undisputed that the "General" has at all times since its acquisition under the 1890 lease been under the exclusive custody and control of the defendant, or its predecessor in interest, and that since its acquisition all costs incident to the maintenance, repair and display of the engine have been borne by the defendant or its predecessor in interest.

THE LAW AND THE GENERAL

Before turning to a consideration of issues of substantive law, it should be noted that the jurisdiction of this Court, in the present lawsuit is based upon diversity of citizenship as between the parties. Accordingly, this Court must look to the law of Tennessee in resolving all issues of substantive law, the same as would have occurred in the state court had the case not been removed to this court. *Erie Railroad Co. v. Tompkins*, (1938) 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817.

As noted in the introductory portion of this opinion, the plaintiffs advance four legal theories or contentions as a basis for sustaining their attachment and for securing the retention of the "General" in the City of Chattanooga as a historical monument. Briefly these theories and contentions are (1) that a gift or dedication of the "General" in the nature of a charitable trust had been made by the defendant to the City or to the citizens of Chattanooga; (2) that the City and its citizens have acquired a prescriptive right in the "General"; (3) that the defendant had by its conduct impliedly contracted with the City and its citizens that the "General" would remain in Chattanooga permanently as a historical monument; and (4) that the defendant would be estopped from removing the "General".

The latter three contentions of the plaintiffs, that is the existence of rights in the "General" by reason of prescription, implied contract, or estoppel, may be considered without the necessity of extended discussion. The plaintiffs omitted any reference to these theories in their brief and argument. It is not clear from the complaint just how the term "prescriptive right" is used by the plaintiffs. If it is used in its accurate sense, there of course could be no

prescriptive right in the plaintiffs, for when correctly used the word "prescription" refers to the acquisition of an easement or other incorporeal hereditament in real property and is not a term accurately used with reference to interest in personal property. See 25 *Am. Jur.2d*, "Easements and Licenses" §39 et seq., 3 *Am. Jur.2d*, "Adverse Possession" §4. To the extent that the claim of prescriptive rights may have been intended by the plaintiffs as an assertion of rights acquired by adverse possession, it is clear that there has never been any possession of the "General" by the plaintiffs, much less an open, public, notorious or "adverse" possession. See 3 *Am. Jur.2d*, "Adverse Possession" §202. To the exten that the claim of prescriptive rights may have been intended by the plaintiffs as asserting rights acquired by donation, either outright or in the nature of a trust, these claims will be hereinafter fully considered. Much that has been said with reference to the plaintiffs' use of the term "prescription" in their complaint would be equally applicable to the use of the term "dedication" in their complaint. Dedication refers to the intentional appropriation or donation of land and is not accurately used to describe the gift or donation of personal property, whether in trust or otherwise. See 23 *Am. Jur.2d*, "Dedication" §1. To the extent that the term "dedication" is used by the plaintiffs to mean a donation, either outright or in trust, these claims will be hereinafter fully considered.

Considering next the plaintiffs' assertion in their complaint of the acquisition of rights in the "General" by reason of an implied contract, there is no evidence in this record of any contractual rights in the plaintiffs having been acquired by the plaintiffs. In their response to interrogatories the plaintiffs themselves state, "There is no written contract of which the plaintiffs are aware between the defendant and the City of Chattanooga or anyone on

its behalf relative to the engine 'General'." (Response to Interrogatory No. 5) There is likewise an absence of evidence of an oral contract. While contracts may be implied from a course of conduct, there is no evidence of any mutuality of promises sufficient to support a contract even by implication. Concededly neither the City of Chattanooga nor its citizens have ever assumed any obligation toward the maintenance or display of the "General", nor have they made any promise to or assumed any obligation toward the defendant. The element of mutuality essential to a contract, whether express or implied, is wholly absent in the record.

If by implied contract the plaintiffs seek to assert the existence of a quasi contract, or a contract implied in law, this theory, too, is wholly without factual support in the record. Quasi contracts, or contracts implied in law, arise only where one party has been unjustly enriched at the expense of another. Under such circumstances the law implies a promise to make restitution to the extent of the unjust enrichment. There is a total absence of evidence in the record in this case of any element of unjust enrichment on the part of the defendant in its acquisition or possession of the "General".

Finally, and with regard to the third contention made in the pleadings, but upon which the plaintiffs advanced no argument in support thereof, that is the claim of acquisition of rights in the "General" by way of estoppel, it is clear that estoppel can never be asserted to create a right nor to give a cause of action, but rather it serves only to prevent losses otherwise inescapable and to preserve rights already acquired. *Henry County* v. *Standard Oil Co.*, (1934) 167 Tenn. 485, 71 S.W.2d 683, 93 A.L.R. 1483; see also 28 *Am. Jur.2d*, "Estoppel and Waiver" §33. As is often stated in this regard, estoppel operates always as a shield

and never as a sword. Additionally, there is an absence of evidence in this case either of such conduct on the part of the defendant or of such reliance on the part of the plaintiffs as would give rise to an equitable estoppel. This is particularly true under the law of Tennessee where the doctrine of promissory estoppel has been rejected. *Barnes v. Boyd*, (1934) 18 Tenn.App. 55, 72 S.W.2d 573.

The full thrust of the plaintiffs' argument is directed toward their contention that the defendant's actions and representations in regard to the "General" have been such as to create a charitable trust in favor of the City and its citizens with regard to the "General". The evidence in support of this contention, when looked to in a light most favorable to the plaintiffs, may be summarized as follows. The Nashville Chattanooga & St. Louis Railway first acquired possession of the "General" from the State of Georgia under its lease of the Western and Atlantic Railway in 1890. By subsequent amendments to that lease the Nashville, Chattanooga & St. Louis Railway acquired the right to obtain full title to the "General" by payment of an agreed and rather nominal amount at the termination of the current lease in 1969. Shortly after acquiring possession of the "General" the locomotive was put on display by the Nashville, Chattanooga & St. Louis Railway in its Union Station at Chattanooga, Tennessee. The engine remained on such display, with the exception of short intervals, from 1891 until 1961, its status as a Civil War relic and its role in the history of that war being appropriately announced. The events giving rise to the fame of the "General" were centered about Chattanooga and the City was therefore an appropriate place for the display of the engine. Moreover, the City of Chattanooga demonstrated its interest and recognition of the presence of the "General" as a historical monument in its midst by

adopting a likeness of the "General" upon its official seal. The citizens of Chattanooga likewise participated in the recognition of the "General" as a historical monument welcomed within Chattanooga and advertised the engine as a significant tourist attraction in the City. From time to time the Nashville, Chattanooga & St. Louis Railway, acting both in its own name and in the name of the Western and Atlantic Railway, issued pamphlets and brochures advertising the presence of the "General" on display in its Union Station in Chattanooga, Tennessee, the following being language typical to these publications:

> "The engine 'General' made famous by the Andrews Raiders, has been sent to Chattanooga, Tennessee, by the Nashville, Chattanooga & St. Louis Railway and given a prominent place in the Union Depot. It is there to remain permanently as a monument to American valor and can be seen at any time by travelers passing through Chattanooga over this Railway."

While on display in Chattanooga, the "General" was at all times in the sole custody and control of the Nashville, Chattanooga & St. Louis Railway and its successor, The Louisville and Nashville Railroad, and was located upon property privately owned by the said railroads. They bore the entire cost of the maintenance and display of the "General" and neither the City of Chattanooga nor its citizens appear to have contributed any financial or other material support to the maintenance or display of the engine. The "General" was removed from Chattanooga in 1961 by the defendant, The Louisville and Nashville Railroad, with the representation that it would be returned to Chattanooga after repairs and after the engine had been used elsewhere in Civil War Centennial activities. However, the engine was not so returned to Chattanooga and in 1967 The Louisville and Nashville Railroad made a com-

mitment to the State of Georgia to deliver the "General" to that State for permanent display at Kennesaw, Georgia.

There appears to be no question but that valid trusts for charitable uses may be created in Tennessee. *White* v. *Hale*, (1865) 42 Tenn. 77; *Gibson* v. *Frye Institute*, (1917) 137 Tenn. 452, 193 S.W. 1059, L.R.A. 1917D 1062; *Milligan* v. *Greenville College*, (1928) 156 Tenn. 495, 2 S.W.2d 90; *Davis* v. *Bullington*, (1932) 164 Tenn. 272, 47 S.W.2d 555. Likewise it would appear that no question exists but that a valid charitable trust could be created with respect to a locomotive having historic value such as the "General". The establishment and preservation of historical monuments possess such educational qualities and contribute to accomplish such socially beneficial purposes as to qualify as the subject of a charitable trust. See annotation: "Validity, As For a Charitable Purpose, of Trust For Dissemination or Preservation of Material of Historical or other Educational Interest or Value" 129 A.L.R.2d 849; *Bogart, Law of Trusts*, p. 142 et seq; see also 15 *Am.Jur.2d*, "Charities" §81.

The issue presented for decision here is accordingly whether, under the evidence as recounted above, a valid and irrevocable charitable trust was in fact created in favor of the City of Chattanooga and its citizens with respect to the "General". The Court is of the opinion that the evidence would not support any such conclusion and this for two reasons. In the first place, although charitable trusts are favored by the courts and are therefore exempt from some of the rules applicable to private trusts, such as the rule against perpetuities, many of the requisites to a valid private trust are also requisites to a valid charitable trust. One such requisite is that there must be a reasonably certain expression of a donative trust intent before a charitable trust may be found. *Ratto* v. *Nashville Trust*

Co., (1942) 178 Tenn. 457, 159 S.W.2d 88, 141 A.L.R. 341. The Court is of the opinion that the evidence here fails to establish an intent upon the part of the defendant or its predecessor in interest to establish a charitable trust with respect to the "General". Although the use of the words "trust" or "charitable trust" are not essential to the creation of a charitable trust, some reasonable equivalent of such a donative intent and purpose must appear. *Restatement of Trusts*, Vol. 2, §351. Never at any time from 1891 to the present has the defendant or its predecessor in interest ever done or said anything to indicate an intent to relinquish any custody, control, or possession of the "General" to or for the use of the City of Chattanooga or its citizens. The defendant has at all times exercised full and complete dominion and control over the "General," including displaying the engine at all times on its private property, always assuming full financial and custodial responsibility for the maintenance and display of the "General," moving the locomotive at such times and to such places as it elected so to do. Neither was the announcement that the display was a "permanent monument to American valor" indicative of such a donative intent as to authorize a court to construe the defendant's possession and custody as that of a trustee of a charitable trust. To hold that the prolonged display of a privately owned historic relic upon private property and at private expense, when accompanied by an announcement that it constitutes a permanent historical monument, is sufficient of itself to create a charitable trust with respect to such relic could well have the effect of withdrawing from public display privately owned objects of great historic, artistic or educational interest. Such forcing into the public domain of artistic, educational or historic items in the absence of a donative intent and merely because they are capable of being the object

of a charitable trust might well have the opposite effect to that which it is the purpose of charitable trusts to encourage, that purpose being the social benefit that comes from the public display of such items.

In the second place, even assuming that a valid charitable trust was created in favor of the City of Chattanooga and its citizens with respect to the "General," under the law of Tennessee that trust would have been subject to relocation at any time. The plaintiffs rely upon the representations made by the defendant and its predecessors that the "General" would be "permanently" located in the Union Station at Chattanooga, Tennessee. Under Tennessee law it appears to be settled that a charitable trust may be relocated even though it was stated to have been "permanently" established at a particular location. In the case of *Southwestern Presbyterian University* v. *Clarksville*, (1923) 149 Tenn. 256, 259 S.W. 550, this very issue was before the Court. In that case Southwestern Presbyterian University had for some 50 years been located at Clarksville, Tennessee. The University had been supported over the years in a substantial manner by monetary contributions from citizens of Clarksville and the City itself on one occasion donated $50,000.00 to the University. Under its charter, as well as in some conveyances to the University, it was provided that the University was "permanently" located at Clarksville. The directors of the University proposed to move the institution from Clarksville, Tennessee, to Atlanta, Georgia. The City of Clarksville resisted the move asserting, as does the City of Chattanooga in this case, that a charitable trust existed requiring the location of the University at Clarksville in perpetuity. The Supreme Court of Tennessee held, however, that the University could be relocated and that the words describing the University

as "permanently" located at Clarksville did not prevent the relocation. In this regard the Court stated:

> ". . . In this connection it may be remarked that the use of the words 'permanently located' in the third paragraph is not inconsistent with this conclusion. 'Permanent' is not synonymous with 'perpetual.' It is used in contrast with temporary—as a permanent residence, rather than a transient, or a permanent road, rather than a makeshift—but in ordinary acceptation it does not convey the idea of never changing. One adopts a permanent location, or occupation, meaning only that the adoption is made without present contemplation of change, but subject always to exigencies or inducements of circumstances which may arise. The words 'permanently located' used in a conveyance of land to an incorporated institution were construed by the supreme court of the United States in an early case not to mean perpetually. *Mead* v. *Ballard*, 7 Wall. 290, 19 L.Ed. 190." *Id.* at 266-267.

Under the holding of the Tennessee Supreme Court in the *Southwestern Presbyterian University* case, it would appear clear that the defendant would have the right to relocate the "General," even though it were found to be the subject of a charitable trust.

In conclusion it should be noted that the issue before this Court is not the appropriateness or inappropriateness of the display of the "General" either in Chattanooga, Tennessee, or in Kennesaw, Georgia. Nor is it for this Court to decide where or how the "General" might most appropriately be displayed. A suggestion having merit in the eyes of the Court is that the Chickamauga Battle Field National Monument, Chickamauga, Georgia, would be an appropriate placement for the display of the "General". However, this could be accomplished only by negotiations between the parties in interest and is beyond the prerogatives of the

Court in this action. The sole issue before this Court is whether the City of Chattanooga is or is not entitled to maintain the present attachment and injunction action. The Court has concluded that the attachment in this case must be released and the injunction dissolved and the case dismissed. The Court would have preferred that its decision could have been otherwise. The Louisville and Nashville Railroad has made representations unto the City of Chattanooga with respect to the "General", which it appears it does not now expect to fulfill. No legal remedy exists, however, in this regard.

An order will enter in accordance with this opinion.

/s/ Frank W. Wilson
United States District Judge

Order and Judgment

(Filed January 22, 1969)

This cause came on to be heard on the motion of the defendant for summary judgment, and on the cross-motion of the plaintiffs for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the court having considered the admissions and uncontested allegations in the pleadings, various affidavits, the plaintiffs' joint answers to the interrogatories; and a series of fourteen documents, and the court having heard the argument of counsel and having considered the written briefs furnished by counsel, and due deliberation having been had thereon, and upon filing the opinion of the court dated and filed the 4th day of January, 1969, it is hereby

ORDERED, that defendant's motion for summary judgment be and the same hereby is in all respects granted, and the attachment in this case be released and the injunction dissolved, and the case dismissed, and it is further

ORDERED, that plaintiffs' cross-motion for summary judgment be and the same hereby is in all respects denied, and it is further

ORDERED, ADJUDGED and DECREED that this case be dismissed, and that the defendant recover its costs.

Dated:

/s/ Frank W. Wilson
United States District Judge

Memorandum

(Filed May 27, 1969)

This case is before the Court upon the plaintiffs' motion for a new trial. The motion asserts three principal matters: (1) that the Court was in error in arriving at the conclusion that the City of Chattanooga would have no legal or equitable claim to the historic locomotive, "The General," and the Court should accordingly reconsider each of the contentions heretofore made by the plaintiffs; (2) that since the judgment of the Court was entered, new evidence has been discovered in support of the plaintiffs' claim to "The General", warranting the granting of a new trial; and (3) that the Court, in holding that even were "The General" subject to a charitable trust, it was nevertheless subject to relocation at any time under Tennessee law, misconstrued the decision of the Tennessee Supreme Court in the case of *Southwestern Presbyterian University* v. *Clarksville*, (1923) 149 Tenn. 256, 259 S.W. 550.

Considering first the plaintiffs' contentions with regard to newly discovered evidence, this evidence consists principally of an account of "The General" in a book entitled *History and Steam Locomotives* by Richard E. Prince and additional newspaper accounts of the early

history of "The General" regarding its original display in Chattanooga, Tennessee, as a Civil War relic. This history and these newspaper accounts, obtained through additional research of newspaper files for the years between 1892 and 1901, reflect that while "The General" was displayed in Chattanooga at a Civil War reunion in 1892, the engine did not remain in Chattanooga at that time, but was taken elsewhere by the Nashville, Chattanooga & St. Louis Railway and displayed, including the World Columbian Exhibition in Chicago in 1893, the Cotton States and International Exhibition in Atlanta, Georgia, in 1895 and in Nashville, Tennessee, in 1897 for the Tennessee Centennial Exposition. The additional newspaper accounts would appear to reflect that "The General" may first have been placed on "permanent" display in Chattanooga by the Nashville, Chattanooga & St. Louis Railway about May of 1901. On the basis of other newspaper accounts about this time protesting that Chattanooga was being discriminated against in the matter of railroad rates, it is suggested by the plaintiff that the placement of "The General" on permanent display in Chattanooga was in furtherance of the Railway's efforts to develop business and cultivate good will in the Chattanooga area.

Accepting the newly discovered matters at face value, the Court is nevertheless of the opinion that they would not provide a basis for a modification of the Court's previous findings. On the basis of the previous record, the Court concluded that "The General" had been on display in Chattanooga since 1891. On the basis of the additional information submitted by the plaintiff, it now appears that the locomotive was only temporarily placed on display in Chattanooga in 1892 and was not returned to that City for permanent display until 1901. The newly submitted evi-

dence does not in any wise alter the Court's findings in its former opinion wherein it was stated:

> "Never at any time from 1891 to the present has the defendant or its predecessor in interest ever done or said anything to indicate an intent to relinquish any custody, control, or possession of 'The General' to or for the use of the City of Chattanooga or its citizens. Defendant has at all times exercised full and complete dominion and control over 'The General,' including displaying the engine at all times on its private property, always assuming full financial and custodial responsibility for the maintenance and display of the 'General,' moving the locomotive at such times and to such places as it elected so to do. Neither was the announcement that the display was a 'permanent monument to American valor' indicative of such a donative intent as to authorize a court to construe the defendant's possession and custody as that of a trustee of a charitable trust."

Assuming that the new evidence here tendered would meet all other requirements for the granting of a new trial on the basis of newly discovered evidence, it is of course well settled that newly discovered evidence will not provide a basis for granting a new trial unless such newly discovered evidence would likely lead to a different result from that arrived at in the original trial. 39 Am.Jur., "New Trial" §165. On the basis that the new evidence indicated that "The General" may have first been placed on display in Chattanooga in 1901 rather than in the 1890's, the plaintiffs seek to have the Court reopen the evidence and permit the plaintiffs to take further discovery from the defendant. The defendant, however, has filed an affidavit stating that it has no further evidence in regard to the display of "The General" in Chattanooga other than that which was introduced on the trial.

The remaining grounds in the plaintiffs' motion seek to have the Court generally reconsider its former opinion and specifically reconsider its interpretation of the decision of the Tennessee Supreme Court in the case of *Southwestern Presbyterian University* v. *Clarksville*, (1923) 149 Tenn. 256, 259 S.W. 550. In so far as the plaintiffs seek to have the Court generally reconsider its former opinion, the Court has now considered each contention made by the plaintiffs in their motion for new trial and is of the opinion that each of these matters was correctly decided in the Court's original opinion.

Turning to the case of *Southwestern Presbyterian University* v. *Clarksville*, *supra*, while it is true that the Court there dealt with a Tennessee general welfare corporation and while it is likewise true that the designation of the University as being "permanently" located in Clarksville was contained in an earlier court decree, rather than in the corporate charter as stated by this Court in its former opinion, the Tennessee Supreme Court did there construe the word "permanent" with reference to the location of the University and concluded that the word was not synonymous with the word "perpetual" and accordingly allowed the University to be moved from Clarksville. The portion of the opinion wherein the Court construed the meaning of the word "permanent" was correctly stated by this Court in its former opinion.

The Court is accordingly of the opinion that each of the conclusions arrived at in its former opinion, both those of fact and those of law, was correct and that upon reconsideration that opinion must accordingly be allowed to stand as the opinion of the Court. The plaintiffs' motion for new trial will be denied.

An order will enter accordingly.

s Frank W. Wilson

Order

(Filed May 28, 1969)

This case is before the Court upon the plaintiffs' motion for new trial. Having considered the motion and each ground thereof, the Court is of the opinion that the motion should be denied for the reasons set forth in a memorandum filed herein.

It is accordingly ORDERED that the plaintiffs' motion for new trial be and the same is hereby denied.

APPROVED FOR ENTRY.

s/ Frank W. Wilson
United States District Judge